IN THE

Supreme Court of the United States

DEC 29 1966

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OCTOBER TERM, 1966

No. 900

GLADYS TOWLES ROOT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

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TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Gladys Towles Root and petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a decision of that court which reversed the decision of the United States District Court for the Central District of California dismissing a 148 page indictment against the petitioner, an attorney, in which petitioner was charged with subornation of perjury and obstructing justice.

JURISDICTION

Jurisdiction is conferred by Section 1254(3), Title 28, U.S. Codes, Rule 7(c), Federal Rules of Criminal Procedure, Section 3731, Title 18, U.S. Codes, and applicable decisions and rules of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved, all of which are set out in Appendix A, and made a part hereof, are: Fifth Amendment, United States Constitution; Sixth Amendment, United States Constitution; Title 18, Sections 1503, 1621, 1622, and 3731, U.S. Codes; Title 28, Section 1654, U.S. Codes; Rule 7(c), Federal Rules of Criminal Procedure.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is set forth in Appendix B, and made a part hereof.

The opinion of the Honorable Peirson M. Hall, Judge of the United States District Court for the Central District of California, is set forth in Appendix C, and made a part hereof.

THE FACTS

Petitioner, Gladys Towles Root, is an attorney at law of many years standing in the practice of law in Los Angeles County. She represented John William Irwin, one of the co-defendants in the trial of three defendants charged with the kidnapping of Frank Sinatra, Jr., the

son of the well known actor and singer. The three defendants were John William Irwin, Joseph Clyde Amsler and Barry Worthington Keenan.

It was the theory of defense attorney Root in the Sinatra kidnapping trial that it had been prearranged for the purposes of gaining young Sinatra publicity to advance his efforts in a motion picture and acting career. Irwin, Amsler and Keenan were convicted of the kidnapping, except that Irwin, who was represented by Mrs. Root, was acquitted of the actual kidnapping. An appeal on behalf of Irwin and Amsler is now still pending and undecided in the United States Court of Appeals for the Ninth Circuit.

After the convictions of the three defendants, they were lodged in the Los Angeles County Jail and later to prison. Irwin and Amsler have appealed their convictions and their cases are now pending on appeal in the Ninth Circuit.

An indictment was filed against Gladys Towles Root and another attorney, George A. Forde, charging them with subornation of perjury and obstructing justice in putting forth the defense of publicity and hoax. The indictment was filed July 29, 1964. (C.T. 2) After a hearing, the indictment was dismissed on November 2, 1964. (C.T. 53) No appeal was taken from the dismissal of the first indictment and that judgment of dismissal became final.

Thereafter, a second indictment was filed which is 148 pages long and is the subject of a second motion to

dismiss on the ground that the indictment did not state an offense against the laws of the United States in that it did not comply with Rule 7(c), Federal Rules of Criminal Procedure in that it was too lengthy (it would take 2 hours and 18 minutes, at least to read the indictment to the jury), that it did not specify which false testimony "may or may not be scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the transcript of the evidence of the trial in case No. 33,087-CR". (C.T. 287)

The trial court found that the indictment fails to inform the defendants "of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in case No. 33,087-CR, they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated." (C.T. 287-288)

The government appealed the case to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court. Petitioner filed a cross-appeal in the Circuit Court on the grounds that attorneys, as a class, are excluded from service on the grand jury which returned the indictment and women attorneys, particularly, are excluded as a class from service on the grand jury which returned the indictment. On motion of the government, the cross-appeal was dismissed. Nevertheless, during the course of the presentation of the case to the Circuit Court, petitioner urged

these points. Implicit in the reversal of the District Court's judgment and order is the holding of the Circuit Court against the petitioner on these grounds.

Also, petitioner contended in the Circuit Court that where an indictment was returned by the grand jury and a motion to dismiss was made and granted by the District Court and no appeal was taken from that order, it became res judicata as to any subsequent proceedings or indictment. This contention was also overruled.

It was further contended by petitioner that the cause was improperly appealed to the Court of Appeals for the Ninth Circuit; that a construction of the indictment under Rule 7(c), Federal Rules of Criminal Procedure, involved the construction and interpretation of a constitutional provision or statute and excludes the Court of Appeals from jurisdiction of such appeals. (*U. S. v. Hvass,* 355 US 570, 2 L.ed.2d 496)

Petitioner contended that the sole jurisdiction to appeal in the case was in the Supreme Court of the United States, pursuant to the provisions of Section 3731 of Title 18, U.S. Codes. This contention was also overruled.

QUESTIONS PRESENTED

1. Whether an indictment which is 148 pages in length and weighs several pounds complies with the constitutional provision to inform an accused, the court and the jury of the nature and cause of an accusation or is so prolix, ambiguous and confusing as to be an unconstitutional construction of the constitutional requirement of the Sixth Amendment.

2. Whether an appeal in this case lies exclusively to the Supreme Court of the United States and whether, in view of this fact, the Circuit Court of Appeals lacks jurisdiction in the light of the provisions of Title 18, Section 3731, U.S. Codes..

3. Whether a construction of Rule 7(c), Federal Rules of Criminal Procedure, is a statute within the meaning of Title 18, Section 3731, U.S. Codes, requiring the matter to be appealed directly to the Supreme Court of the United States and whether Rules of Court are construed such statutes in the light of *U.S. v. Hvass,* 355 US 570, 2 L.ed.2d 496.

4. Whether a dismissal of a prior indictment in the U.S. District Court, which is not appealed, is res judicata as to a second and superseding indictment.

5. Whether Rule 7(c), Federal Rules of Criminal Procedure, which requires an indictment to be a "plain, concise and definite written statement of the essential facts constituting the offense charged" is violated by a prolix indictment of 148 pages, weighing several pounds, and requires its dismissal.

6. Whether an indictment charging subornation of perjury is fatally defective in failing specifically to point out in plain, simple language just what was false, what was known to the witness who testified to be false and whether the defendant knew that it was false at the time of the alleged subornation and at the time of the testimony.

7. Whether an indictment for subornation of perjury is fatally defective in failing to allege that the defendant

knew that the testimony which he influenced the suborned witness to give was false and that in giving such testimony the witness would wilfully and corruptly commit the crime of perjury.

8. Whether an indictment charging subornation of perjury and setting out that the matters were material must specify more than the conclusion that it is material and specify wherein the testimony was and is material so that the court, in the first instance, can determine whether a crime has been charged and whether the defendant can have the protection on appeal and other proceedings of showing the lack of materiality of the matters alleged to have been suborned testimony.

9. Whether petitioner can raise the point as to the systematic exclusion of lawyers from the grand jury which returned the indictment as a violation of her constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States. (*Ballard v. United States,* 329 U.S. 187, 91 L.ed. 181; *Zap v. United States,* 328 U.S. 624, 90 L.ed. 1477)

10. Whether petitioner can raise the point and have the court determine the invalidity of the indictment on the ground that women lawyers were excluded from the grand jury which returned the indictment. (*Ballard v. United States,* 329 U.S. 187, 91 L.ed. 181; *Zap v. United States,* 328 U.S. 624, 90 L.ed. 1477)

REASONS FOR GRANTING THE WRIT

This Court should grant the writ, in its supervisory administration of justice, to determine whether an indictment of 148 pages violates the Sixth Amendment to the

Constitution of the United States and Rule 7(c), Federal Rules of Criminal Procedure.

Assuming that it takes at least one minute to read a page aloud, it would take 2 hours and 18 minutes to read this indictment to the jury, if allowed to stand. We submit that no juror would or could intelligently follow such a reading, nor does this kind of an indictment inform an accused of the nature and cause of the accusation (Sixth Amendment), nor does it comply with Rule 7(c), Federal Rules of Criminal Procedure, which requires an indictment to contain a "plain, concise and definite written statement of the essential facts constituting the offense charged."

This Court, and this Court alone, has jurisdiction of the construction and interpretation of Federal Rules of Criminal Procedure. (*United States v. Hvass,* 335 US 570, 2 L.ed.2d 496)

This Court should also decide whether the grand jury which returned this indictment was illegally constituted in that all lawyers, by a court rule of the Central District of California, are intentionally excluded from the grand jury. (See Appendix D.) This Court should also, in its administration of criminal justice, decide whether this question can be properly raised on a cross-appeal on behalf of the appellee or decided on the appeal itself without any cross-appeal. (*United States v. Meyer,* 266 F.2d 747, 756)

This Court should also decide whether the intentional and systematic exclusion of women lawyers from the grand jury which returned the indictment vitiates the indictment. (*Ballard v. United States,* 329 US 187, 91 L.ed. 181; *Thiel v. So. Pacific Co.,* 328 US 217, 90

L.ed. 1181, *Zap v. United States*, 328 US 624, 90 L.ed. 1477)

The trial court, in dismissing this indictment, said:

> "While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning maters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR.
>
> "Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indictment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated." (C.T. 287-288)

The indictment in this case violates the Sixth Amendment to the Constitution of the United States requiring

that a defendant be informed of the nature and cause of the accusation. That amendment has been the law and still is the law.

U.S. v. Cruikshank, 92 US 542, 23 L.ed. 588

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

The indictment in this case violates Rule 7(c), Federal Rules of Criminal Procedure.

Rule 7(c), Federal Rules of Criminal Procedure, provides:

> "Nature and contents. The indictment of the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . ."

Certainly it cannot be said that the indictment in this case is plain, concise and a definite written statement of the essential facts constituting the offense charged. By this language the rule meant to exclude nonessential facts under the rule of *inclusio unius est exclusio alterius.* The maxim means that it excludes from its effect all those matters not expressly mentioned; it means the inclusion of one thing is the exclusion of another.

Burgin v. Forbes, 169 S.W.2d 321, 325

Therefore, the rule intended to exclude all of the non-essential facts to the charge and in this case, the non-essential matters embracing the charge of perjury. The various counts, therefore, contain unessential matters, making for an indictment of 148 pages. Can such an indictment be said to be "concise"?

Concise statement of cause of action requires terseness of statement as distinguished from long and prolix history.

Dallas RR & Terminal Co., v. Sutherland, Texas, 27 S.W.2d 830, 832

In *Taylor v. Neal,* 157 N.E. 646, 260 Mass. 427, the complaint of 231 pages was held violative of that state's rule requiring a concise statement and demurrers thereto rightly sustained.

Under Rule 29 for Government of Courts of Civil Appeal the Texas court held that the words "concise statement of the case", concise means "stated in a few words".

West Texas Utilities Co. v. Pennington, Texas, 11 S.W.2d 583, 584

The words mean the elimination of a long and prolix statement with a multitude of impertinent allegations.

McLaughlin v. Emery, 44 Mo. 350, 354

Chasson v. Marley, 28 S.E.2d 223, 224, 223 N.Car. 738

The word concise is defined as "brief, short; containing a few words or the principal matters only".

Curtiss v. Corbett, (N.Y.) 25 Howe's Pra. 58, 62, 63

The indictment in this case is therefore violative of Rule 7, Federal Rules of Criminal Procedure in that it is not (1) concise and (2) not confined to the essential facts constituting the offense.

Government counsel in his oral argument in the District Court acknowledged that parts of the indictment contained matters which are true and said he could pinpoint,

if given time, the parts that he alleges are false. But he can do this only because of his familiarity with the case. It is not a plain, concise statement to one unfamiliar with the case.

In *U.S. v. Cruikshank,* 92 US 542, 575, 558, 23 L.ed. 588 the Supreme Court of the United States said:

> "In crimininal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed of the nature and cause of the accusation'. Amendment VI. In U.S. v. Mills, 7 Pet. 142 this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged' and in U.S. v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged'. It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, — it must descend to particulars.' (1 Arch. C.R. and P.L. 291). The object of the indictment is, first, to furnish the accused with such a description of the charge against him that it will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged so that it may decide whether they are sufficient in

law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charges against him and the court must be able to decide whether the property taken was such as was the subject of larceny."

See also:

The Schooner Hoppet and Cargo v. U.S., 7 Cranch 389, 3 L.ed. 380

Pettibone v. U.S., 148 US 197

U.S. v. Standard Brewery, 251 US 210

Weare v. U.S., 1 F.2d 617

U.S. v. Cook, 17 Wall. 168, 174, 21 L.ed. 538

Ledbetter v. U.S., 170 US 606,611, 42 L.ed. 1162

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

U.S. v. Debrow, 203 F.2d 699, 702

An example of an indictment specifically setting out what the proposed perjury was to be is contained in *U.S. v. Debrow*, 203 F.2d 699, 702, footnote 1.

See also:

United States v. Cobert, 227 F.Supp. 915, 48 Corpus Juris 879, Sec. 128

United States v. Seymour, 50 F.2d 930

United States v. Laut, 17 F.R.D. 31, at page 34

United States v. Dennee, Fed. Cas. No. 14,947

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and affirm the judgment of the District Court and reverse the judgment of the Circuit Court and order the indictment dismissed.

Respectfully submitted,

MORRIS LAVINE

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